United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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76-1011

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1011

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK LUCAS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANT, FRANK LUCAS

JEFFREY C. HOFFMAN,
Attorney for Appellant, Frank Lucas,
477 Madison Avenue,
New York, N. Y. 10022
(212) 688-7788

STEVEN DUKE,
JOHN L. POLLOK,
Of Counsel.

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Introduction

This reply brief is confined to those issues on which the Government raised significant, unanticipated claims in its brief which were not adequately aired in oral argument. Accordingly, appellant's failure to reply to some of the Government's arguments herein merely means that they were fully anticipated in the main brief or answered orally. All claims of error and all arguments made in appellant's main brief are adhered to.*

* Appellant's point headings below correspond to the point heading in his main brief.

POINT II

The Court erred in admitting $585,000 in cash into evidence.

The Government seems to argue that evidence that $585,000 was found in Lucas' home in January, 1975, was proof that he bought narcotics from Perna, Malizia, and Verzino in 1973. Such an inference would be so strained and vaporous as to approach, if not cross, into the realm of speculation See 1 Wigmore, Evidence 601 (3d ed. 1940). It is one thing to infer that the money came from narcotics, as in *United States* v. *Tramunti*, 513 F.2d 1087 (2d Cir. 1975), where the money was seized in the middle of the conspiracy and in the course of a conspiratorial act; quite another to speculate that it came from the operations of a conspiracy long since terminated.

Even if probative and admissible, moreover, it was flagrantly prejudicial to introduce the actual money. Actually bringing the massive amounts of cash into the courtroom, in the company of armed guards, was not, as the Government would have it, merely making "the jury . . . aware of the existence of the money" (p. 55). The Court recognized this difference in *Tramunti*, *supra*, and in other cases cited by appellant (p. 23).

The Government claims, however, that once the court ruled the cash admissible, defendants were obliged not to accept the court's ruling. Rather, they should have merely regrouped and argued that only photographs should come in. There would be no end of wrangling in trial courts if such an obligation were imposed on the defense. It is not for the defense, however, to tell the Government what evidence to offer, anymore that it is the duty of the court.

POINT IV

The charge was prolix, confusing, contradictory, and full of error.

The Government notably ignores appellant's claim that the charge was prolix, contradictory, and confusing. Instead, it contents itself with quotations from isolated portions of the charge which it claims were correct (pp. 103-105, 110-111, 115-117). Appellant conceded, however, that buried among the gibberish were numerous correct statements of the law. His principal complaint was that those statements were almost without exception contradicted by others, and that statements of law, correct as well as contradictory, were obscured by lengthy i[illegible]ancies, personal aggrandizements, stories, prejud[illegible] comments and a[illegible]ides. To have objected to each specific remark in these categories, and to have pointed out precisely the prejudicial character of each specific statement, as the Government suggests should have been done, would have been an impossibility. Paradoxically, but importantly, it is appellant who complains of the charge as a whole and the Government, in an unusual stance, which is relying on specific portions to sustain the whole.

A. The charge on conspiracy

1. Definition of conspiracy

The Government does not and cannot deny that the charge contains numerous erroneous definitions of conspiracy, as appellant noted in his main brief (pp. 29-31). It claims, however, that the court "repeatedly instructed the jury . . . that a conspiracy is a combination or agreement of two or more persons to accomplish a criminal or unlawful purpose by concerted action and that the

gist of the crime is an unlawful agreement or combination to violate the law" (p. 98-99). Yet a rereading of the charge, with particular references to the pages cited by the Government (Tr. 4058, 4060, 4070, 4158, 4163, 4164-66) shows that while each of the *words* appears somewhere in the charge, nowhere do they appear *together* in the form and order, or with the approximate meaning, that they have when the Government gathers them together. "These defendants are guilty" also appears in the charge in a similar sense.

Even if the court had thus defined conspiracy, and even if it were appropriate to ignore the contradictory definitions, however, the definition would have been inadequate, as appellant pointed out (pp. 30-31).

2. Membership in the conspiracy

The Government also pregnantly ignores appellant's claim that the court gave hopelessly contradictory instructions on what evidence may be considered in determining each defendant's guilt. Compare appellant's brief, pp. 32-34 and Government brief, pp. 99-100). The argument is ignored because it cannot be answered.

3. Responsibility for acts and statements of co-conspirators

The Government erroneously asserts (p. 100) that appellant concedes the propriety of *evidentiary* use of co-conspirator hearsay uttered before the defendant against whom it is used had any connection with the conspiracy. Appellant concedes no such thing (see p. 35). But the Government's further effort to rescue this portion of the charge is preposterous. The Government claims (p. 101) that the court's repeated statements that a defendant is "bound by" such statements and "acts"

(A. 284-285), and that he "assumes all the liabilities of the partnership, including those that occurred before he became a member even" (A. 402), were understood by the jury to refer only to what evidence may be considered on the conspiracy count, and that these charges clearly had no bearing on the jury's consideration of the substantive offenses. There is no basis for such a conclusion. The charges were plainly not so limited.

4. The charge on single conspiracy

The Government wholly misconstrues appellant's argument on this point. The point was that the charge on multiple conspiracy was meaningless without a relevant, coherent definition of a single conspiracy (pp. 36-37). Here, unlike in *United States* v. *Bynum*, 485 F.2d 490 (2d Cir. 1973), there was nothing which could remotely be described as a "meticulous" charge on the "elements and characteristics of a single conspiracy." *Id.* at 37. The charge which the Government relies upon for this task (p. 36-37) is quite inadequate, if it even speaks to the point. Since conspiracy itself was nowhere coherently or correctly defined, the charge on single conspiracy was necessarily meaningless.

5. The "ugly creature" with its spreading tenacles

The Government points out (p. 102), as did appellant (p 38), that when a similar (but much tamer) charge was on review in *United States* v. *Logan*, 427 F.2d 911 (2d Cir. 1970), this Court failed to find it *reversible* error. Yet the charge in *Logan*, which the Court plainly disapproved as creating a "risk that the judy might have been tempted to decide issues on extraneous standards instead of legal ones," *Id.* at 916, was garnished below with references to an "ugly creature with its tentacles" (A. 279), "embedded deep in the very

maw of the earth" (A. 278), which must be "lop[ped] off" (A. 279).

Instead of heeding this Court's admonition to leave such lectures out of his charge, Judge Cooper elaborated on them below. It is therefore clear that this Court's admonitions (see also, *United States* v. *Casino*, 467 F.2d 610, 619 (2d Cir. 1972)) must be deemed reversible error or they will go unheeded as they have in the past. Six years of admonitions are surely more than enough. Cf. *United States* v. *Bertolotti*, 529 F.2d 149, 151 (2d Cir 1975); *United States* v. *Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946) (Judge Frank dissenting).

B. The Pinkerton charge

The Government concedes that it would have been error to give a *Pinkerton* charge applicable to appellant Lucas, but argues that no such charge was given (p. 115). Contrary to the Government's claim, however, the *Pinkerton* charge was not "strictly limited solely to those substantive counts in which [other defendants] were named" (p. 115). As appellant acknowledged, a legal technician would regard the *Pinkerton* charge as applying only to other defendants (p. 40, n. 31), but a jury would not.

C. Accomplice testimony

The Government concedes that the defendants were entitled to the standard accomplice charge, but seems to claim that the charge was given and that it was "simple and straightforward" (p. 105). It was not. The charge was as diluted and at least as confusing as to the one held reversible error in *United States* v. *Gonzales*, 488 F.2d 833 (2d Cir. 1973).

As appellant noted, moreover, the charge given was seriously undercut not only by the charge concerning testifying defendants, but by comments, outside the evidence, concerning Perna's plea bargain and sentencing expectations (p. 41-46). The Government labors to obscure the fact that Judge Cooper himself in effect told the jury he had made no promises * to Perna when in fact he had told Perna, "I am not giving you the maximum . . ." (R. 1322). The Government speculates that "it is highly doubtful that any juror ever believed that Perna at any time viewed the prospect of [receiving the maximum] as anything other than a mere theoretical possibility" (p. 107). Yet the record offers little support for this speculation. On the contrary, a juror might well wonder, as does appellant, what Judge Cooper's point was in making the remarks he made unless it was to induce just such a belief.

D. Reasonable doubt

The Government concedes that this Court, and the Supreme Court, have repeatedly disapproved of the "willing to act" language employed by Judge Cooper (p. 112). It concedes that equating reasonable doubt as one "founded in reason" has also been disapproved. It concedes that equating reasonable doubt with "significant persuasiveness" is wrong (p. 114). And it does not deny appellant's claim (p. 49) that the charge was heavily weighted against the defendants. If ever this crucible of due process was disregarded, therefore, it was below.

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* That this was precisely what Judge Cooper intended his remarks to mean need not be left to conjecture. He so informed counsel (R. 1325).

POINT V

The district court should have held a hearing to determine the facts concerning suppressed evidence or, in the alternative, granted a new trial.

In *Giglio* v. *United States*, 405 U.S. 150 (1974), the Supreme Court ruled that the "prosecutor's office is an entity and as such it is the spokesman for the Government." Further, "procedures and regulations can be established... [to] insure communication of all relevant information on each case to each lawyer who deals with it." *Id.* at 154. Now, more than four years later, the Government is seeking to excuse its failure to disclose and turn over to the defense three written statements and grand jury testimony by one of its main witnesses, all plainly producible under 18 U.S.C. § 3500 and *Brady* v. *Maryland*, 373 U.S. 83 (1963), on the untested, uncorroborated claim that the assistant who actually tried the case was unaware of them. This is outrageous. These documents, which contain lies to the Government, were of such high value to the defense that they could not have escaped the prosecutor's attention. Here, as in *United States* v. *Sperling*, 506 F.2d 1323, 1333 (2d Cir. 1974), the failure to turn over these materials, whether a failure of the assistant possessing them but not trying the instant case, as in *Sperling*, or the assistant trying the case, "cannot be excused as due to a breakdown in channels of communication." *Cf. Carter* v. *New Jersey*, 19 Cr. L. 2013 (N.J. Sup. Ct. 1976).

This court has repeatedly admonished the Government to get its files in order, as the Supreme Court did in *Giglio*. See *United States* v. *Sperling*, *supra* ("we feel compelled to admonish that we view such failures in the most serious light" *Id.* at 1333). As Judge Friendly

pointed out in *United States* v. *Morell*, 524 F.2d 550, 557 (concurring and dissenting):

> "It is high time that United States Attorneys in this circuit took effective means to heed the Chief Justice's admonition in *Giglio*. . . This should be particularly easy when . . . the material concerns the prosecution's chief witness. . . [A reversal] would reinforce the lesson we need to teach. The republic will not perish if these defendants . . . should go free."

Since the failure to turn over the statements and grand jury testimony was at the very least "gross negligence," its materiality alone requires a new trial. *United States* v. *Morell*, *supra* at 554. Thus, there is no need for an evidentiary hearing. A new trial must be granted.

Judge Cooper's finding that the suppression was not deliberate is plainly based upon an erroneous conception that the Government may lawfully suppress *Brady* and § 3500 material and escape under the rubric of inadvertence provided it suppresses the material from the assistant trying the case as well as the defense. This is not the meaning of "inadvertence." See *United States* v. *Sperling*, *supra*; *United States* v. *Morell*, *supra*.

Even if the assistant's affidavit were conclusive, irrebutable proof of its contents, there was no basis for a conclusion of inadvertence. It has been conceeded that the documents were in possession of another assistant during the trial below, presumably the one in charge of the jail break prosecution. No effort whatever was made to explain how or why the documents were not made available below. Are we to believe that the possessing assistant was unaware that his chief witness was also a witness below? Was that a matter of such indifference to him that he paid no attention to it? Was he, unaware

of the Government's obligations Was he, or could he possibly have been, unaware that these statements were valuable impeaching material in *any* prosecution in which Perna was a witness ? The record is silent on these, and other, questions which cry out for answers before the full scope of the Government's culpability can be assessed. *United States* v. *Hilton*, 521 F.2d 164, 167 (2d Cir. 1975).

Moreover, the assistant's affidavit is not conclusive. Surely, on a matter as serious as this, cross-examination is required by Due Process. The defense, not being privy to the operations of the U.S. Attorney's office, is hardly in a position to controvert directly such allegations, but it is certainly entitled to explore their meaning and credibility. *United States* v. *Franzese*, 525 F.2d 27 (2d Cir. 1975), upon which the Government relies, is wholly inapt. *Franzese* was a § 2255 proceeding in which affidavits in support of the motion contained generalities and hearsay suggestive of Government misconduct. The Court held that, "even crediting [the] affidavits" they did not "make out a sufficient claim of prosecutorial suppression . . . to warrant relief. *Id.* at 31. In this case, prosecutorial suppression is admitted. The only issue, if any, is the degree of Government culpability in that suppression.

Relying upon the validity, finality, and fairness of the trial court's *ex parte* determination of inadvertence, the Government then argues that the trial judge was correct in determining, again without a hearing, that there was no significant chance that the evidence "could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir. 1969). In support of this claim, the Government labels Perna as "perhaps the most impeached witness in modern times" (p. 68). Yet this argument supports appellants. It is precisely in those cases, like

the present one, where the suppressed evidence adds "another arrow to [a] rather large quiver [already] shot at [the witness]," that a new trial is required. *Id.* at 830. See also, *United States* v. *Pacelli*, 491 F.2d 1108 (2d Cir. 1974); *United States* v. *Sperling*, *supra*. Moreover, since these materials were not only *Brady* material but plainly producible under § 3500, there is "no room for [the court] to speculate as to how useful this statement [would have been] for purposes of cross-examination . . ." *United States* v. *Ellenbogen*, 341 F.2d 893 (2d Cir. 1965).

Furthermore, the suppressed evidence was of great significance. Perna portrayed himself as a person who had become rehabilitated after his arrest and had told the Government the entire truth from that point on. Nowhere did he admit that he had in fact lied to the Government after becoming a cooperative witness. The Government admits this, but argues that the defense showed no interest in this line of impeachment because they asked no questions about it (p. 71). But the short answer to that is that no questions were asked in this area because the Government had suppressed all the evidence which would have afforded a basis for questions.

Finally, the Government assumes that if questioned about having told the truth to the Government during the entire period of his capture, Perna would have told the truth, i.e. admitted he lied. On the other hand, he may well have said yes. He then would have been proven a perjurer and his entire testimony could well have been disregarded by the jury. The truth is it cannot be confidently asserted what effect the suppression had. A new trial is required.

POINT VI

The right of representation at every stage of the proceedings was denied.

The Government implicitly, and correctly, concedes that appellant Lucas had a constiutional right to representation by counsel during the judge's preliminary remarks to the jury and during the hearing of several motions on September 22 (pp. 77-72). The Government also implicitly concedes, as it must, that it was error for Judge Cooper to conduct these phases of the proceeding without the presence or knowledge of Lucas' counsel. Instead, it is claimed that the error was waived when counsel, on September 24, failed to object. Secondly, it is argued that no prejudice was shown (p. 80).

It was, of course, impossible for Lucas' counsel to object to the proceedings being carried on in his absence, because he wasn't there to object and wasn't even told that the proceedings were to take place. Once a critical stage of the proceedings is completed without counsel, an objection at a later stage is plainly not required, *White* v. *Maryland*, 373 U.S. 59 (1963). It is too late, once that stage has passed, to undo the possibility of prejudice. Since counsel was not present, he could not have observed gestures or other behavior of defendants, other counsel, or spectators in the courtroom, or facial expressions or tones of voice in the judge's remarks, regarding which he might have made a curative objection. Even if a cold record were examined by him in a later stage of the trial (an assumption not shown by the record), it would not reveal the full proceedings which had transpired before the jury. In any event, there would be no way to erase what had transpired.

Regarding the motions which were heard in counsel's absence, the Government claims that counsel for Lucas, assuming he somehow learned of the motions and arguments thereon before the trial was resumed on September 24, should have asked to have them reconsidered, or at least sought to adduce additional argument (p. 81). There is no basis in the record for the assumption underlying the Government's claim. Moreover, the motion that a wholly fresh consideration of new arguments can be obtain 1 two days after the trial judge has publicly announced his decision on a motion is so naive it need not be taken seriously.

In Re Di Bella, 518 F.2d 955 (2d Cir. 1975), on which the Government relies, hardly supports its position. There, the Court considered for the first time whether the right to counsel applied in contempt proceedings. Concluding that it did, the Court then went on to decide whether that right had been infringed when the judge required counsel for a grand jury witness to absent himself while the witness' previous grand jury testimony (a series of questions and refusals to answer) was read to the judge and the witness. The judge then permitted counsel to return and permitted the witness to relate to him what had transpired in the grand jury. After such consultation, the witness, on advice of counsel, refused to appear again before the grand jury or answer any questions. This court held that excluding counsel during reading of the grand jury minutes, while error, was not reversible because the contempt occurred in counsel's presence and it was made clear that the witness would answer no questions under any circumstances. Thus the phraseology of the questions had nothing to do with the contempt and could not possibly have been prejudicial.

United States v. *Schor*, 418 F.2d 26 (2d Cir. 1969), upon which the Government also relies, supports appellant. There, the jury sent out two notes, asking ques-

tions. The trial judge answered them by writing "no" on the note. Assuming that defense counsel had agreed to this procedure, this Court nonetheless found reversible error. The Constitution and Rule 43, the Court held, require that such notes be answered orally in open court, with counsel and the defendant present. Since it was *possible* that such a procedure would have produced clarificaton of the notes, reversal was requred.

Here, it is possible that in counsel's absence, some gesture or misconduct, not reflected on the record, occurred to the prejudice of defendant Lucas. It is also possible that had Lucas' counsel been present when the motions were argued and some of them decided, that counsel's contribution might have altered a result. Even if the doctrine of harmless error were applicable, the burden of eliminating these possibilities is on the Government. *Chapman* v. *California*, 386 U.S. 18 (1967).

Geders v. *United States*, U.S., , 44 U.S.L.W. 4420 (March 30, 1976), decided subsequent to appellant's main brief, clearly reaffirms the Supreme Court's previous position, expressed in *White* v. *Maryland*, *supra*, and *Glasser* v. *United States*, 315 U.S. 60 (1942), that the doctrine of harmless error is inapplicable to the deprivation of counsel. In *Gedders*, although the issue of harmless error was briefed and argued, the Court unanimously reversed a conviction, on right to counsel grounds, without remotely suggesting that prejudice appeared from the record.

In any event, where, as here, the right to counsel is indisputable and undisputed, and it was the plainest of error to proceed without counsel, reversal is plainly required.

POINT VII

The court illegally increased the sentence in the written judgment and commitment.

The Government admits, as it must, that Judge Cooper said nothing whatever, at his oral pronouncement of sentence, about the sentence being consecutive to other sentence (p. 126). The Government seems to argue, however, that a defendant can later be sentenced *in absentia*, via the written commitment, so long as the written judgment merely adds to rather than flatly contradicts the oral sentence. By such reasoning, a judge could impose a fine orally, then add twenty years in prison when he signs the written judgment. Few things are clearer in the law, however, than that it "is the oral sentence which constitutes the judgment of the court" any any modifications or additions thereto in the commitment are "invalid since [defendant] was not present. . ." *Sobell* v. *United States*, 407 F.2d 180, 184 (2d Cir. 1969).

CONCLUSION

It is respectfully submitted that the judgment appealed from should be reversed and this case be remanded for a new trial or in the alternative that the case be remanded for a hearing on the issue of suppression of evidence favorable to the defense; and that in any event, this case be remanded to correct the written judgment and commitment heretofore entered against the defendant Lucas. If any further proceedings are ordered, it is respectfully submitted that they should be before a different judge.

Respectfully submitted,

JEFFREY C. HOFFMAN,
Attorney for Appellant, Frank Lucas,
477 Madison Avenue,
New York, N. Y. 10022
(212) 688-7788

STEVEN DUKE,
JOHN L. POLLOK,
Of Counsel.

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